

A **SABAH FOREST INDUSTRIES SDN BHD**

v.

UNP PLYWOOD SDN BHD

B FEDERAL COURT, PUTRAJAYA
AUGUSTINE PAUL FCJ
HASHIM YUSOFF FCJ
MOHD GHAZALI YUSOFF FCJ
C [CIVIL APPEAL NO: 02(F)-26-2008 (S)]
11 SEPTEMBER 2009

CIVIL PROCEDURE: *Appeal - Framing of questions - Whether framing of questions vague and incomplete - Whether questions if answered would have no relevance to outcome of appeal - Courts of Judicature Act 1964, s. 96(a)*

TRADE AND INDUSTRY: *Forestry - Licence to take timber - Whether non-transferable licence - Appeal to Federal Court on questions posed that licence non-transferable - Whether framing of questions vague and incomplete - Whether questions if answered would have no relevance to outcome of appeal - Courts of Judicature Act 1964, s. 96(a) - Forest Enactment 1968 (Sabah), ss. 15, 24(6) - Forest Rules 1969, r. 3*

F The appellant was issued a timber licence by the Sabah state government to fell, convert and extract timber from a piece of alienated land of about 258,584 hectares. The appellant then entered into two agreements with the respondent to extract and sell timber in respect of 11,302 hectares of the land. The appellant was subsequently notified by the Sabah Forestry Department that the two agreements were invalidated by virtue of s. 24(6) of the Sabah Forest Enactment 1968 ('the Enactment') which essentially stated that the licence was non-transferable. Accordingly, the appellant discharged itself from performance of the two agreements and that resulted in the respondent bringing an action against the appellant in the High Court for breach of contract. The High Court dismissed the action on the ground that the two agreements were illegal and void as it amounted to an assignment of the appellant's licence to the respondent that was prohibited by law. The respondent appealed to the Court of Appeal and the appellate court found that the licence did not come under s. 24 of the Enactment but under s. 15 of the same. It was held that the two agreements did not amount to an assignment as not all the rights under the licence were assigned and that the

respondent still retained control over the felling of the timber. Also, that s. 15 of the Enactment pertained to a licence agreement and not to a mere licence and that the licence issued to the respondent was in the form of an agreement. Further, a licence agreement might contain terms that were inconsistent with the provisions of the Enactment and yet remained valid. The Court of Appeal then allowed the respondent's appeal. The appellant applied for leave to appeal to the Federal Court based on six questions. Leave was allowed. The issue before the Federal Court was the framing of the questions below.

Question 1 – Whether a timber licence which was stated on the document as being issued by the appropriate authority under s. 24 of the Enactment ceased to be one because of non-compliance with the format of licence prescribed in the Forest Rules 1969;

Question 2 – Whether the Court of Appeal was correct in law in classifying the impugned licence as a s. 15 licence under the Enactment when the licence was issued by the Director of Forestry whereas a s. 15 licence could only be issued by the Chief Minister;

Question 3 – Taking into account the express prohibition against transfer of rights or privileges provided in s. 16 of the Enactment and assuming that the timber licence was a s. 15 licence, whether the Court of Appeal was correct in law in holding that a s. 15 licence could be freely assigned if the express terms of the licence did not prohibit assignment in any of its clauses;

Question 4 – Whether the Court of Appeal was correct in applying the test or marker used in *Perkayuan OKS Sdn Bhd v. Kelantan State Economic Development Corporation* to determine the non-assignability or non-transferability of a timber licence under the Enactment when the case did not turn on the interpretation of s. 24(6) or any other provision of the Enactment;

Question 5 – Whether the Court of Appeal acted correctly in law in omitting to follow established tests to determine the conduct amounting to the transfer or assignment of a timber licence, which was prohibited under s. 24(6) of the Enactment as laid down by the former Federal Court in the early cases of *Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd* and *Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co Sdn Bhd* and their progeny; and

- A Question 6 – Whether as a matter of law, there was any difference to the application of s. 24(6) of the Enactment if the subject matter consisted of only a portion of the licence area.

Held (dismissing the appeal)

- B **Per Augustine Paul FCJ delivering judgment of the court:**

- C (1) Parties must exercise extreme care and caution in drafting questions for appeal under s. 96(a) of the Courts of Judicature Act 1964. If the questions did not have the effect of affecting the outcome of appeal, the court might decline to answer them. (paras 8 & 9)
- D (2) Questions 1, 4, 5 and 6 were in relation to s. 24 of the Enactment while questions 2 and 3 were in relation to s. 15 of the same. It must immediately be observed that question 3 was not relevant as it related to a transfer of rights or privileges in a forest reserve while the land in question was alienated land. Question 2 was also not relevant as a declaration of the licence as one issued under s. 24 would automatically nullify the finding of the Court of Appeal that the licence was one that was issued under s. 15. Furthermore, any answer to the question in absence of such declaration would have no bearing on the outcome of appeal in favour of appellant. Questions 1, 4, 5 and 6 must be viewed against the background of finding of the Court of Appeal that the licence was not one that was issued under s. 24. The answers to the questions must therefore have the effect of reversing that finding to enable the appellant to succeed in the appeal. Questions 4, 5 and 6 were premised on the basis that the licence was one that was issued under s. 24. If the licence was one that was not so issued, they would have no bearing on the outcome of appeal. Therefore, any answers given to the questions would be academic and would become relevant only if it was established that the licence did in fact come within s. 24. The only remaining question to be considered as to whether it had that effect was question 1. (para 10)
- H (3) In order to appreciate question 1, reference must be made to r. 3 of the Forest Rules 1969. That provision must be read with s. 71 of the Interpretation Acts 1948 and 1967. From that reading, there could be no doubt that slight deviations from prescribed forms within the meaning of s. 71 would not invalidate them. But it must be reiterated that where non-
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compliance was substantial, the licence would become invalidated. It was therefore absolutely necessary to consider the precise nature of non-compliance with the forms in order to determine its effect. However, question 1 was vague and incomplete for it did not identify the specific aspect of non-compliance with the format of licences in order to render it worthy of consideration. An effective analysis of non-compliance could only be made with the necessary particulars. It was therefore not possible to go any further in order to make an attempt to answer question 1 as the particular aspect of non-compliance had not been identified. It followed that questions 4, 5 and 6 ceased to be of any relevance and need not be answered. (paras 11, 12 & 13)

- (4) As none of six questions posed could be answered, the appeal must be dismissed without a consideration of its merits. (para 14)

Bahasa Malaysia Translation Of Headnotes

Perayu dikeluarkan lesen kayu balak oleh kerajaan negeri Sabah bagi menebus, menukar dan mengeluarkan kayu balak daripada sebidang tanah bermilik seluas 258,584 hektar. Perayu kemudian memasuki dua perjanjian dengan responden untuk mengeluarkan dan menjual kayu balak daripada 11,302 hektar tanah tersebut. Perayu selanjutnya diberitahu oleh Jabatan Perhutanan Sabah bahawa perjanjian-perjanjian tersebut ditaksahkan oleh sebab s. 24(6) Enakmen Hutan 1968 ('Enakmen tersebut'), yang pada dasarnya, menyatakan lesen tersebut tidak boleh dipindahkan. Selanjutnya, perayu menganggap ia dilepaskan dari pelaksanaan perjanjian-perjanjian tersebut dan itu mengakibatkan responden membawa tindakan terhadap responden di Mahkamah Tinggi untuk kemungkiran kontrak. Mahkamah Tinggi menolak tindakan tersebut atas alasan perjanjian-perjanjian tersebut tak sah dan terbatal kerana ia merupakan satu serahhak lesen perayu kepada responden yang dilarang oleh undang-undang. Responden merayu kepada Mahkamah Rayuan yang mendapati lesen tersebut tidak jatuh di bawah s. 24 Enakmen tetapi di bawah s. 15 Akta yang sama. Ianya diputuskan bahawa perjanjian-perjanjian tersebut tidak merupakan satu serahhak kerana tidak semua hak di bawah lesen tersebut diserahkan dan yang responden masih menyimpan kawalan atas penebusan kayu balak. Juga, s. 15 Enakmen berhubung dengan perjanjian lesen dan tidak kepada lesen sahaja dan yang lesen yang dikeluarkan kepada responden adalah dalam

- A bentuk perjanjian. Lebih lagi, satu perjanjian lesen mungkin mengandungi terma-terma yang tidak konsisten dengan peruntukan-peruntukan Enakmen tetapi masih tetap sah. Mahkamah Rayuan kemudian membenarkan rayuan responden. Perayu memohon kebenaran merayu kepada Mahkamah Persekutuan berdasarkan 6
- B soalan. Kebenaran merayu dibenarkan. Isu di hadapan Mahkamah Persekutuan ialah cara soalan-soalan di bawah dirangkakan.

C Soalan 1 – Sama ada sesuatu timber lesen yang dicatatkan atas dokumen sebagai lesen yang dikeluarkan oleh pihak berkuasa berkenaan di bawah s. 24 Enakmen berhenti menjadi lesen kerana tidak mengikuti format lesen sepertimana ditentukan oleh Kaedah-Kaedah Perhutanan 1969;

D Soalan 2 – Sama ada Mahkamah Rayuan betul dari segi undang-undang mengelaskan lesen yang disyaki tersebut sebagai s. 15 lesen di bawah Enakmen bila lesen tersebut dikeluarkan oleh Pengarah Perhutanan sedangkan satu lesen s. 15 hanya boleh dikeluarkan oleh Ketua Menteri;

E Soalan 3 – Dengan mengambilkira larangan ternyata pindahan hak-hak atau keistimewaan-keistimewaan yang diberi s. 16 Enakmen dan andaian yang lesen kayu balak itu ialah lesen s. 15, sama ada Mahkamah Rayuan betul dari segi undang-undang memutuskan bahawa suatu lesen s. 15 boleh diserahkan dengan bebas jika terma-terma ternyata lesen tidak melarang serahan di mana-mana

F klausanya;

G Soalan 4 – Sama ada Mahkamah Rayuan betul memakai ujian atau penanda yang digunakan di dalam kes *Perkayuan OKS Sdn Bhd v. Kelantan State Economic Development Corporation* untuk menentukan ketidakserahan atau ketidakpindahan lesen kayu balak di bawah Enakmen apabila kes tidak berdasarkan tafsiran s. 24(6) atau mana-mana peruntukan lain Enakmen;

H Soalan 5 – Sama ada Mahkamah Rayuan bertindak betul dari segi undang-undang dengan tidak mengikuti ujian-ujian terbukti untuk menentukan tindakan yang merupakan pindahan atau serahan lesen kayu balak, yang dilarang di bawah s. 24(6) Enakmen sepertimana ditetapkan oleh Mahkamah Persekutuan sebelumnya dalam kes-kes awal *Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd* dan *Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co Sdn Bhd* dan kes-kes berkaitan selepas kes-kes tersebut; dan

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Soalan 6 – Sama ada mengikut undang-undang, ada perbezaan aplikasi s. 24(6) Enakmen jika hal perkara hanya meliputi sebahagian kawasan lesen. A

Diputuskan (menolak rayuan)

Oleh Augustine Paul HMP menyampaikan penghakiman mahkamah: B

- (1) Pihak-pihak mesti berjaga dan berwaspada mendrafkan soalan-soalan untuk rayuan di bawah s. 96(a) Akta Kehakiman Mahkamah 1964. Jika soalan-soalan tidak berkesan mengesankan akibat rayuan itu, mahkamah mungkin menolak menjawab mereka. C
- (2) Soalan-soalan 1, 4, 5 dan 6 berkaitan s. 24 Enakmen manakala soalan-soalan 2 dan 3 berkaitan s. 15 Enakmen yang sama. Ianya mesti diperhatikan dengan segera bahawa soalan 3 tidak relevan kerana ia berkaitan pindahan hak-hak dan keistimewaan di dalam hutan rizab manakala tanah berkenaan tanah bermilik. Soalan 2 juga tidak relevan kerana deklarasi lesen sebagai lesen yang dikeluarkan di bawah s. 24 akan membatalkan secara automatik keputusan Mahkamah Rayuan yang lesen tersebut adalah lesen yang dikeluarkan di bawah s. 15. Lebih lagi, mana-mana jawapan kepada soalan tanpa deklarasi seperti itu tidak akan berkesan mengesankan akibat rayuan berpihakkan perayu. Soalan-soalan 1, 4, 5 dan 6 mesti dilihat berlandaskan latarbelakang keputusan Mahkamah Rayuan yang lesen tersebut adalah lesen yang tidak dikeluarkan di bawah s. 24. Jawapan-jawapan kepada soalan-soalan, dengan itu, mesti berkesan mengakaskan keputusan itu untuk membolehkan perayu berjaya dalam rayuannya. Soalan-soalan 4, 5 dan 6 didasarkan atas premis yang lesen tersebut adalah lesen yang dikeluarkan di bawah s. 24. Jika lesen tersebut merupakan lesen yang tidak dikeluarkan di bawah seksyen tersebut, ianya tidak berkesan mengesankan akibat rayuan. Maka, apa-apa jawapan yang diberi kepada soalan-soalan tersebut akan menjadi akademik dan hanya menjadi relevan jika dibuktikan lesen tersebut memang terlingkung ke dalam s. 24. Soalan yang tertinggal untuk dipertimbangkan sama ada ianya mempunyai kesan tersebut adalah soalan 1. D
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- (3) Untuk mempertimbangkan soalan 1, rujukan mesti dibuat kepada k. 3 Kaedah-Kaedah Perhutanan 1969. Peruntukan itu mesti dibaca dengan s. 71 Akta Tafsiran 1948 dan 1967. Daripada bacaan itu, ianya tidak diragui bahawa lencongan I

- A sedikit daripada borang-borang yang ditentukan dalam makna s. 71 tidak mentaksahkan. Tetapi ianya mesti ditekankan bahawa di mana ketakpatuhan itu agak banyak, lesen boleh ditaksahkan. Dengan itu, ianya perlu dipertimbangkan secara khususnya di mana ketakpatuhan kepada borang-borang itu
- B untuk menentukan kesannya. Tetapi, soalan 1 kabur dan tidak lengkap kerana ianya tidak mengecamkan di mana ketakpatuhan itu untuk pertimbangan. Suatu analisa yang berkesan hanya boleh dibuat dengan butir-butir yang perlu. Dengan itu, tidak perlu mencuba menjawab soalan 1 selanjutnya kerana aspek ketakpatuhan itu tidak dicamkan. Ianya mengikut bahawa soalan 4, 5 dan 6 berhenti menjadi relevan dan tidak perlu dijawab.
- C (4) Disebabkan kesemua enam soalan-soalan itu tidak boleh dijawabkan, maka rayuan mesti ditolak tanpa pertimbangan meritnya.
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Case(s) referred to:

- Joceline Tan Poh Choo & Ors v. V Muthusamy* [2009] 1 CLJ 650 FC (**refd**)
Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd [1971] 2 MLJ 161 (**refd**)
- E *Perkayuan OKS No 2 Sdn Bhd v. Kelantan State Economic Development Corporation* [1995] 1 CLJ 761 FC (**refd**)
Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 200 (**refd**)

Legislation referred to:

- F Courts of Judicature Act 1964, s. 96(a)
Forest Rules 1969 (Sabah), r. 3
Forest Enactment 1968 (Sabah), ss. 15, 16, 24(6)
Interpretation Acts 1948 and 1967, s. 71
- G *For the appellant - Cyrus Das (Norbert Yapp & Celestina Stuel Galid with him); M/s Jayasuriya Kah & Co*
For the respondent - Alvin John (Marina Tiu with him); M/s Yap Chin & Tiu
[Appeal from Court of Appeal, Civil Appeal No: S-02-261-2007]
- H Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul FCJ:

- I [1] This appeal raises for consideration yet again the significance of the proper manner of framing questions for argument in the Federal Court pursuant to s. 96(a) of the Courts of Judicature Act 1964 (“s. 96(a)”).

[2] In this case a timber licence was issued and entered into by and with agreement between the Director of Forestry for and on behalf of the Government of the State of Sabah and Sabah Forest Industries Sdn Bhd (the appellant before us) from 16 October 1990 till 15 October 1995 to fell, convert and extract timber from a piece of alienated land covering an area of about 258,584 hectares of timber land. By two agreements dated 28 June 1993 and 13 August 1993 the appellant allowed UNP Plywood Sdn Bhd (the respondent before us) to extract commercial timber logs from a total area of 11,302 hectares of land. By two powers of Attorney dated 4 August 1993 and 22 September 1993 the appellant appointed the respondent as its attorney to, *inter alia*, manage and superintend the extraction and sale of timber and to enter into contracts and arrangements of all kinds in respect of the two agreements. By a letter dated 22 August 1994 the appellant notified the respondent that it had been informed by the Forestry Department that the two agreements entered into by them had contravened s. 24(6) of the Forest Enactment 1968 (“section 24(6)”) and, accordingly, it had regarded itself as being discharged from performance of the two agreements. Section 24(6) reads as follows:

A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provision of any written law.

[3] The respondent filed an action in the High Court against the appellant for breach of contract. It was dismissed by the High Court on the ground that the two agreements entered into by them were illegal and void as it amounted to an assignment of the appellant’s licence to the respondent as it was prohibited by law.

[4] The respondent appealed to the Court of Appeal. In ruling that the licence in this case does not come within s. 24 of the Forest Enactment 1968 (“s. 24”) Gopal Sri Ram JCA (as he then was) said:

The respondent’s case is that the licence in question was issued under section 24 of the Forest Enactment, 1968. For this contention the respondent relied on the following endorsement at the foot of the Timber Licence (see at page 337 of volume 2 of the record of appeal) as follows:

A In Witness Hereof, the Director for and on behalf of the Government of the State of Sabah and empowered by Section 4 and 24 of the Forest enactment, 1968 has hereunder set his hand on this 26th day of Oct 1990.

B Under rule 3 of the Forest Rules, 1969 a licence issued under section 24 must be in Form 1, Form IIA or Form IIB. The licence here is not in any of the said prescribed forms. It is not correct to construe the timber licence as a section 24 licence just because the Director says it is signed or issued under section 24. We are therefore unable to agree with this contention of the respondent.

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[5] It was also held that the two agreements in this case did not amount to an assignment. As Gopal Sri Ram JCA (as he then was) said:

D We return now to the issue of assignment. The impugned agreements make it clear that only 4.3% of the whole area covered by the licence issued to the respondent was made the subject matter of the agreements. Further, clauses 2 and 6 of the agreement dated 28 June 1993 make it clear that the respondent retains control over the felling of the timber. As far as the power of attorney is concerned, this was executed simultaneously with the agreements and is merely an adjunct to enable the appellant to extract timber.

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F Learned counsel for the respondent has submitted that the facts of the present case are indistinguishable from those of *Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd*. [1971] 2 MLJ 161 and *Sundang Timber Co. Sdn. Bhd. v Kinabatangan Development Co. Sdn. Bhd.* [1977] 2 MLJ 200. With respect, we do not agree. In both those cases, the whole of the rights under the licence were assigned to the other party. Here the agreements do not do that.

G They merely confer on the Appellant the right to enter, extract and account for the timber to the respondent. Of course, the appellant has a share in the profits but that does not mean that there was an assignment of the licence.

H In our judgment, the facts of this case are closer to those of *Perkayuan OKS No. 2 Sdn Bhd v. Kelantan State Economic Development Corp* [1995] 1 CLJ 761

I So too here. We find that the agreements in the present instance do not amount to an assignment. In any event we would add that the licence issued to the respondent by the State does not prohibit assignment in any of its clauses. It is also pertinent to note that clause 19 of the licence held by the respondent provides for an arbitration between itself and the Government in the event of any

dispute. It is most unlikely to find such a provision in a licence. Arbitration clauses are normally found in contracts or agreements. Hence there is much force in the appellant's contention that the licence was a licence agreement under section 15 and not a licence issued under section 24 of the Enactment.

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[6] In elaborating further as to why the licence is one issued under s. 15 of the Forest Enactment 1968 ("s. 15") Gopal Sri Ram JCA (as he then was) said:

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Now, section 15 of the Enactment provides as follows:

(1) Save as otherwise provided in this Enactment and notwithstanding the provision of any other State law, no right of any description in or over a Forest Reserve or any part thereof shall be acquired except by virtue, and in accordance with the terms of, a licence agreement entered into by the Minister with the approval of the cabinet or of a licence.

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(1A) A licence agreement entered into by the Minister under subsection (1) of this section may provide for the planting of forest or timber trees upon such terms and conditions as may be agreed.

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(2) Any licence agreement entered into by the Minister under this section shall be subject to any admitted rights or conceded privileges and any special conditions attaching to the Forest Reserve concerned under the provisions of this Enactment, but subject thereto, where any provision of such licence agreement is inconsistent with any provision of this Enactment compliance with the provision of such licence agreement shall be deemed to be compliance with the provisions of this Enactment.

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It is to be noted that section 15 speaks of a licence agreement and not of a mere licence. And if you examine the licence issued to the respondent in the instant case, you will find that it is in the form of an agreement. Hence, the arbitration clause to which we have already referred. Further, it is of importance to note that section 15 in the second limb of its second subsection specifically provides that a licence agreement is not to be treated as being inconsistent with the Enactment though its provisions conflict with those of the latter. In other words, a licence agreement may contain terms that are inconsistent with the provisions of the Enactment and yet remain valid. This clearly points to the superior status that the Enactment confers upon a licence agreement issued under section 15.

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- A [7] The Court of Appeal allowed the appeal by the respondent. The appellant was given leave to appeal to the Federal Court on the following questions:

Question Number 1

- B Whether a timber licence which is stated on the document as being issued by the appropriate authority under s. 24 of the Forest Enactment 1968 ceases to be one because of non-compliance with the format of licence prescribed in the Forest Rules 1969?

C

Question Number 2

- D Whether the Court of Appeal was correct in law in classifying the impugned licence as a s. 15 licence under the Forest Enactment when the said licence was issued by the Director of Forestry whereas a s. 15 licence could only be issued by the Chief Minister?

Question Number 3

- E Taking into account the express prohibition against transfer of rights or privileges provided in s. 16 of the Forest Enactment 1968 and assuming that the timber licence is a s. 15 licence, whether the Court of Appeal was correct in law in holding that a s. 15 licence can be freely assigned if the express terms of the licence does not prohibit assignment in any of its clauses?

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Question Number 4

- G Whether the Court of Appeal was correct in applying the test or marker used in *Perkayuan OKS No 2 Sdn. Bhd. v. Kelantan State Economic Development Corporation* [1995] 1 CLJ 761 to determine non-assignability or non-transferability of a timber licence under the Sabah Forest Enactment when the case did not turn on the interpretation of s. 24(6) or any other provision of the said Enactment?

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Question Number 5

- I Whether the Court of Appeal acted correctly in law in omitting to follow the established tests to determine conduct amounting to the transfer or assignment of a timber licence, which is prohibited under s. 24(6) of the Forest Enactment as laid down by the former Federal Court in the early cases of *Lo Su Tsoon Timber*

Depot v. Southern Estate Sdn. Bhd. [1971] 2 MLJ 161 and *Sundang Timber Co. Sdn. Bhd. v. Kinabatangan Development Co. Sdn. Bhd.* [1977] 2 MLJ 200 and their progeny? A

Question Number 6

Whether as a matter of law, there is any difference to the application of s. 24(6) of the Sabah Forest Enactment if the subject matter consists of only a portion of the licence area? B

[8] Before proceeding any further it is perhaps apposite to observe that parties must exercise extreme care and caution in drafting questions for appeal under s. 96(a). As made clear by this court in *Joceline Tan Poh Choo & Ors v. V. Muthusamy* [2009] 1 CLJ 650 at pp 659-660: C

The next matter for consideration is whether the point if decided in favour of the intending appellant will show that there is a *prima facie* case for success in the appeal. This would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment. It is only then that the question of success in the appeal can arise. It must be remembered that the very object of making appeals to this court subject to leave is to prevent frivolous and needless appeals (see *Kredin Sdn Bhd v. OCBC Bank (M) Bhd* [1998] 2 CLJ 797). Leave to appeal on a proposed question will therefore not be granted if there is no hope of success (see *Beatrice a/p AT Fernandez v. Sistem Penerbangan Malaysia & Ors* [2005] 2 CLJ 713). This is logical. If the answer to the proposed question is obvious in the sense that it will not be in favour of the intending appellant there will be no basis for a *prima facie* case for success in the appeal. Where a decision depends on the application of a well-established principle to an individual set of facts, a further appeal to the Federal Court will be of no utility if it will do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future (see *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1991] 1 CLJ 325). The question posed must relate to a matter in respect of which a determination has been made by the Court of Appeal as otherwise it will be academic (see *The Minister for Human Resources v. Thong Chin Yoong and Another Appeal* [2001] 3 CLJ 933 and *Raphael Pura v. Insas Bhd & Anor* [2003] 1 CLJ 61). It follows D

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- A that a question cannot be based on an assumption that a finding has been made in respect of it when, as a matter of fact, no such finding has been made. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal (see *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 4 CLJ 405). Needless to say, the parties
- B may by consent reframe or amend the question at the hearing stage of the appeal with the approval of the court as demonstrated in *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 3 CLJ 221.
- C [9] If the questions do not have the effect of affecting the outcome of the appeal this court may decline to answer them. In this regard reference may be made to *Joceline Tan Poh Choo & Ors v. V. Muthusamy* [2009] 1 CLJ 650 where this court said at pp 660-661:
- D The corollary is that if there is no prospect of success in the appeal the position of the appellant will not be affected and it would be pointless hearing the appeal. In *Sun Life Assurance Co of Canada v. Jervis* [1944] 1 All ER 469 Viscount Simon LC said at p 470:
- E I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be
- F deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.
- G In *Loknath Padhan v. Birendra Kumar Sahu* AIR [1974] SC 505 Bhagwati J said at p 508:
- H If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the court to engage itself in deciding it. ... It would be clearly futile and meaningless for the court to decide an academic question, the answer to which would not affect the position of one party or the other. The court would not engage in a fruitless exercise.
- I It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so

far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the court would properly decline to do so.

A

Thus this court has the power to decline to answer questions posed in appropriate instances in spite of the fact that leave to appeal had been granted with the result that the appeal must be dismissed without a consideration of its merits. This is demonstrated by cases such as *The Minister for Human Resources v. Thong Chin Yoong and Another Appeal* [2001] 3 CLJ 933, *Raphael Pura v. Insas Bhd v. Anor* [2003] 1 CLJ 61, *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349, *Perwira Affin Bank Bhd v. Lim Ah Hee @ Sim Ah Hee* [2004] 2 CLJ 787 and *Tan Heng Chew & Ors v. Tan Kim Hor & Ors* [2006] 3 CLJ 481.

B

C

[10] It is now necessary to consider the scope of the six questions that have been posed. Question Numbers 1, 4, 5 and 6 are in relation to s. 24 while question Numbers 2 and 3 are in relation to s. 15. It must immediately be observed that Question Number 3 is not relevant as it relates to a transfer of rights or privileges in a forest reserve while the land in this case is alienated land. Question Number 2 is also not relevant as a declaration of the licence as one issued under s. 24 will automatically nullify the finding of the Court of Appeal that the licence is one that is issued under s. 15. Furthermore, any answer to the question in the absence of such a declaration will have no bearing on the outcome of the appeal in favour of the appellant. Question Numbers 1, 4, 5 and 6 must be viewed against the background of the finding of the Court of Appeal that the licence is not one that is issued under s. 24. The answers to the questions must therefore have the effect of reversing this finding to enable the appellant to succeed in the appeal. Question Numbers 4, 5 and 6 are premised on the basis that the licence is one that is issued under s. 24. If the licence is one that was not so issued they will have no bearing on the outcome of the appeal. Thus any answer given to the questions will be academic and will become relevant only if it is first established that the licence does in fact come within s. 24. The only remaining question to be considered as to whether it has this effect is Question Number 1. It reads as follows:

D

E

F

G

H

Whether a timber licence which is stated on the document as being issued by the appropriate authority under section 24 of the Forest Enactment 1968 ceases to be one because of non-compliance with the format of licence prescribed in the Forest Rules 1969?

I

- A [11] In order to appreciate this question reference must be made to r. 3 of the Forest Rules 1969 which reads as follows:

Licences for the purposes of section 24 shall be in Form I, Form IIA or Form IIB as set out in Schedule III.

- B [12] This provision must be read with s. 71 of the Interpretation Acts 1948 and 1967 which reads as follows:

Save as is otherwise expressly provided, whenever forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them.

- C [13] There can therefore be no doubt that only slight deviations from the prescribed forms within the meaning of s. 71 will not invalidate them. But it must be reiterated that where the non-compliance is substantial the licence will become invalidated. It is therefore absolutely necessary to consider the precise nature of non-compliance with the forms in order to determine its effect. However question number 1 is vague and incomplete as it does not identify the specific aspect of non-compliance with the format of licences in order to render it worthy of consideration. It is only with the necessary particulars can there be an effective analysis of the effect of non-compliance with the forms in order to determine whether the licence has become invalidated. It is therefore not possible to go any further in order to make an attempt to answer the question as the particular aspect of non-compliance with the format of licences has not been identified. It follows that question numbers 4, 5 and 6 cease to be of any relevance. They need not be answered.

- F [14] The corollary is that none of the six questions that have been posed can be answered with the result that the appeal must be dismissed without a consideration of its merits.

- G [15] My learned brothers Hashim Yusoff FCJ and Mohd Ghazali Mohd Yusoff FCJ have read this judgment and have expressed full agreement with it. In the upshot the appeal is dismissed with costs. The deposit is to be paid to the respondent on account of the taxed costs.

I